

# FOIA PROCESS

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## EXECUTIVE SUMMARY

*The Freedom of Information Act (FOIA) requests that we reviewed appeared to be processed generally in compliance with the FOIA. Some areas needed improvement, as discussed below.*

*In FY 2000, the Freedom of Information and Privacy Act Branch (FOIA/PA Branch) continued its efforts to acquire a new tracking system for FOIA requests, completed a new training manual for FOIA/PA Branch staff, updated the Commission's FOIA regulations, and conducted a conference for Headquarters and field office FOIA liaisons.*

*Also, the FOIA/PA Branch addressed several matters that we noted during the audit. We found that staff passwords for the FOIA tracking system were provided in the users' guide, a risk to the security of the tracking system. The FOIA officer promptly had the passwords changed. Also, the FOIA/PA officer coordinated with the Commission's Webmaster to add a link on the Commission's home web page to its FOIA web page. In addition, the FOIA/PA Officer requested the capability to run ad hoc reports from the current FOIA tracking system. These actions demonstrate the FOIA/PA Branch's commitment to enhancing its operations.*

*To further enhance FOIA request processing, we recommended that the FOIA/PA Branch: notify requesters of their appeal rights in responses indicating that no records were found; always notify requesters when their requests will take longer than 20 business days to process; clarify language in response letters; require fee agreement in initial FOIA requests; improve documentation of searches and fees assessed; link information to the FOIA web page; and improve maintenance of the FOIA request files.*

## SCOPE AND OBJECTIVES

The audit objective was to evaluate the Commission's compliance with the Freedom of Information Act (FOIA) in processing FOIA requests and determine whether processing improvements were needed. We did not address the Privacy Act during this audit.

We reviewed applicable laws and regulations and interviewed staff in the FOIA/PA Branch, the Divisions of Enforcement, Corporation Finance, Investment Management, and the Office of Information Technology. We also sent a questionnaire on FOIA processing to eighteen Headquarters and field office liaisons

(seven responded). We reviewed applicable documents and performed analyses of relevant data for FOIA requests received in FY 1999.<sup>1</sup>

We conducted the audit fieldwork between March and September 2000 in accordance with generally accepted government auditing standards.

## BACKGROUND

The Freedom of Information and Privacy Act Branch, in the Office of Filings and Information Services (FOIA/PA Branch), processes FOIA<sup>i</sup> requests for agency records. The FOIA/PA Branch includes approximately eighteen staff. It received 2,985 requests in FY 1999<sup>ii</sup>.

The FOIA/PA Branch receives the FOIA request and assigns it to a specialist for processing. The specialist then performs a search for the records. If the records are publicly available, the specialist will refer the requester to the Public Reference Branch or the Commission's web site ([www.sec.gov](http://www.sec.gov)). If the records are not publicly available, the specialist requests and obtains the records to review from the Commission's Records Management Branch, the National Archives and Records Administration's Federal Records Center, or from certain Commission databases. If the FOIA/PA Branch staff does not find responsive records, they will notify the requester. If the records are located in a Headquarters office or division or a field office, the specialist will refer the request to the appropriate FOIA liaison<sup>iii</sup> to perform a search and provide a recommendation as to the appropriate disposition of the request.

The FOIA liaisons and office staff search for and review the records that they find in response to referrals and reply to the FOIA/PA Branch with a recommendation to release or withhold the records. Or, the FOIA liaisons might forward the responsive records to the FOIA/PA Branch for its review. The FOIA/PA Branch then makes a determination to grant or deny access to the records, and notifies the requester by letter of the decision and of any applicable appeal rights.

The FOIA/PA Branch must notify requesters of its decision to release or withhold records responsive to a FOIA request within 20 business days. This time limit may be extended for an additional 10 business days with written notice to the requester. If the FOIA/PA Branch denies the request for records, it must inform the requester of the right to appeal to the Commission's General Counsel. The FOIA/PA Branch reported 41 appeals of initial decisions for FY 1999.

If the requester is not satisfied with the General Counsel's decision on appeal, the requester may file a complaint in U.S. District Court. If the court finds that the agency improperly withheld the requested records, it can order the agency to release them.

The FOIA authorizes agencies to charge fees for searching, reviewing, and copying records in response to FOIA requests. Requesters submit their payments to the Commission's Comptroller's office. The Comptroller's office then forwards the

payments received to the U.S. Treasury. Requesters pay the Commission's contractor for copying services. Under certain circumstances, the FOIA/PA officer may waive these fees.

OFIS engaged a contractor in FY 2000 to perform a comprehensive review of agency records management policies, procedures, and practices, including electronic records. The results of this review could potentially impact the FOIA program through its recommendations concerning records management.

## AUDIT RESULTS

FOIA requests appear to be processed generally in compliance with the FOIA, but some improvements are needed.

Also, we noted that the Division of Corporation Finance experienced significant backlogs in processing FOIA requests between February and March 2000. While this timeframe was outside of the scope of our audit, we noted that the Division was aware of the problem and took steps, including adding staff, to address it. As a result, the backlog is gradually decreasing.

The below recommendations are intended to further improve the FOIA/PA Branch's processing of FOIA requests.

### Notice of Rights to Appeal

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Where the FOIA/PA Branch notifies a requester that no records responsive to the request have been found, the FOIA/PA Branch does not notify the requester of the right to appeal the agency's response.<sup>iv</sup> The United States Court of Appeals for the District of Columbia has held that an agency has a duty to notify a requester of the right to appeal to the head of the agency (or other agency official with delegated authority to hear appeals) in cases where no records are found, as well as cases in which access to specific records is denied.<sup>v</sup> The D.C. Circuit reasoned that a FOIA requester who is dissatisfied with the agency's response that no records have been found might wish to challenge the adequacy of the agency's search. The Office of Information and Privacy of the U.S. Department of Justice agreed that agencies should include a statement concerning the requester's right to appeal in responses informing the requester that no records were found.

#### ***Recommendation A***

The FOIA/PA Branch, in consultation with the Office of General Counsel, should institute a procedure whereby FOIA requesters are notified of their right to appeal responses stating that no records responsive to the request have been found.

## Untimely Responses

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The FOIA requires agencies to determine within 20 business days whether to comply with a request. Agencies may extend this timeframe by an additional ten business days if it provides written notice to the requester explaining why it needs the extension, and tells the requester when it will make the determination. If the agency will need more than the ten-day extension to make the determination, it must give requesters an opportunity to modify their requests or to arrange for an alternative time frame.

The FOIA/PA Branch provided final determinations on FOIA requests within the required 20 business days for 115 of 137 sampled FOIA requests (approximately 84%). The FOIA/PA Branch needed more than 20 business days for 22 of the 137 requests (approximately 16%) because it referred the requests to other Commission offices and divisions for processing.

The FOIA/PA Branch provided “partial” responses for 15 of the 22 requests. The FOIA/PA Branch believed that issuing some information to the requester before the expiration of the 20-day timeframe satisfied the FOIA timeliness requirement. These were not final determinations and did not include the requisite language for ten-day extensions, provide requesters an opportunity to modify the scope of their requests, or arrange for an alternative processing timeframe.

For five of the 22 requests, the FOIA/PA Branch sent a letter to the requester asking for an extension and providing a date for completion of the processing. However, four of the five letters referred to previous telephone conversations where the reasons for the extensions were discussed but did not include the reasons in the letter.

For one of the 22 requests, the FOIA/PA Branch sent the requester a letter asking for additional information. One other letter properly notified the requester that the request was placed into the FOIA/PA Branch’s first-in-first-out (FIFO) processing.

Also, Commission offices and divisions receiving referrals from the FOIA/PA Branch should remember that their processing time counts toward the FOIA/PA Branch’s 20-day timeframe.

### ***Recommendation B***

The FOIA/PA Branch should always notify requesters in accordance with the FOIA when it will exceed the 20-day timeframe for responding to initial requests.

### ***Recommendation C***

For voluminous or complex requests that will likely exceed the 20 business day timeframe and ten business day extension, the FOIA/PA Branch should consider including language in its response letters asking requesters to consider limiting their requests to the information already provided.

### ***Recommendation D***

The FOIA/PA Branch should issue a memorandum to Commission FOIA liaisons to remind them that, according to the Freedom of Information Act, the agency is responsible for meeting the 20-business-day timeframe and reiterate the importance of providing timely responses to the FOIA/PA Branch. Also, the memorandum should remind the liaisons to notify the FOIA/PA Branch when the timeframes will not be met to allow the FOIA/PA Branch to prepare its notices for the requesters.

## **Response Letters**

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In nine of the sample of 137 requests described above, the FOIA/PA Branch's tracking system indicated that requests for records were "granted in full", but the response letters corresponding to the date of the grant did not include a final determination. Instead, the letters directed requesters to submit another request to authorize the FOIA/PA Branch to incur search and review fees. In four of these nine letters, the FOIA/PA Branch notified the requester in advance that it would delete the names, addresses, and telephone numbers in certain files and cited a specific exemption, which would appear to be a denial of information.

According to the FOIA, an agency response to a request is sufficient if it includes a determination regarding the records, the reasons for its decision, and notice of appeal rights if the agency denies access to the records.

The FOIA/PA Branch closed out the requests in the tracking system as of the dates of the nine letters, but the letters were not final determinations. The search and review of the records were not completed and the fees had not yet been agreed to. The FOIA/PA Branch believed that these letters constituted grants of information because the letters identified records from non-public sources. The FOIA/PA Branch counted the requesters' subsequent agreement to pay fees as a new request. It viewed the scope of the request that included the agreement to pay fees as different from that of the initial request.

The FOIA/PA Branch believed that it saved the requesters' time and money by notifying them in advance about information that it will probably withhold. This appears reasonable to prevent requesters from incurring search and review fees for records that might not be useful to them. The FOIA/PA Branch, however, should ensure that it properly notifies requesters of their right to appeal a determination to withhold records or information.

### ***Recommendation E***

The FOIA/PA Branch should always specify the records and information to which access was granted in the letters posted to its tracking system as grants of information.

### ***Recommendation F***

The FOIA/PA Branch should not close out FOIA requests in its tracking system until a final determination has been made.

### ***Recommendation G***

If the FOIA/PA Branch informs requesters in the letter requesting fee authorization that it will withhold information according to a specific exemption, it should also notify requesters of their right to appeal an adverse determination according to the FOIA.

## **Fee Authorization**

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The Commission's procedures for submitting initial FOIA requests do not require that requesters include an agreement to pay fees. As a result, the FOIA/PA Branch requests written agreement from the requester to pay estimated fees after an initial search of records. The Office of Management and Budget (OMB) requires agencies to notify requesters in advance if search and duplication fees are likely to exceed \$25<sup>vi</sup> and the requesters have not previously indicated their willingness to pay. Requiring a written agreement to pay these fees after receiving the initial request imposed an additional processing delay. Obtaining information from requesters in the initial request on the amount of fees that they are willing to pay would reduce the need to interrupt processing of the request.

### ***Recommendation H***

The FOIA/PA Branch should require requesters to include fee authorizations in their initial FOIA requests.

## **Documentation of Searches**

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The FOIA/PA Branch documented its searches with printouts, copies of indices of records maintained at the Federal Records Center and interim storage facilities, and other documents. The FOIA liaisons certified that they conducted an adequate search by signing the referral form that they return to the FOIA/PA Branch. Also, some FOIA liaisons maintained their own additional documentation of searches. The varied forms of this documentation made it difficult to consistently document that adequate searches were performed.

According to guidance provided by OIP, the agency should be able to describe what records it was looking for, where it looked for the records, and how it searched for the records. A consistent format for documenting searches would better ensure that the Commission documents the adequacy of its searches. We are not suggesting a specific form on which to enter search information. However, the documentation should always include the information needed to show evidence of an adequate search.

### ***Recommendation I***

The FOIA/PA Branch, in consultation with OGC, should develop a format to use in documenting adequate searches of records in response to FOIA requests.

### ***Recommendation J***

The office, division, and field office liaisons should use the FOIA/PA Branch's format in documenting their searches and should include a copy of the search documentation with their responses to the FOIA/PA Branch's referrals.

## **Documentation of Fees Assessed**

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The FOIA/PA Branch uses a manual worksheet, the "Search and Review Charges Form," to calculate fees and manually prepares invoices to send to the requesters for the assessed amounts.

Neither the worksheet nor the invoice identifies the requester's classification, provides separate computations of search and review (for commercial requesters) charges, or identifies charges applicable to the specific classification. Also, these documents did not provide an appropriate calculation of computer search time or an analysis of whether the costs of collecting and processing the fee were likely to equal or exceed the fee. In addition, these documents did not show the hours provided by the Commission free of charge.

Four of the seven liaisons that responded to our questionnaire on FOIA processing indicated that they did not submit their search and review time to the FOIA/PA Branch.

We noted one instance where a non-commercial requester was asked to agree to pay estimated review fees. Non-commercial requesters do not pay review fees. Also, the response to one request referred to a Headquarters office indicated that the efforts of six staff were required to answer the request, but the actual fee assessed was approximately \$28.00.

Agencies may assess fees, as appropriate, for search and review time spent in response to FOIA requests. Agencies may not assess fees, however, if the collection costs equal or exceed them. Improving the documentation used to calculate and bill FOIA fees would help avoid these discrepancies.

### ***Recommendation K***

The FOIA/PA Branch should revise its search and review charges calculation to include the classification of the requester, calculate search and review fees separately, show the search time provided free of charge, and determine whether the cost to collect and process the fee exceeds the amount of the fee.

### ***Recommendation L***

The FOIA/PA Branch should coordinate with OIT and the Headquarters and field offices to ensure that computer search hours are properly calculated and assessed in accordance with OMB guidelines.

### ***Recommendation M***

In consultation with the Office of the Comptroller, the FOIA/PA Branch should develop an invoice including this information to show requesters how their fees were calculated.

**Recommendation N**

The Headquarters and field offices should include in their responses to FOIA referrals the number of hours spent searching for and reviewing records.

**Recommendation O**

The Office of the Comptroller should determine the administrative costs of receiving and recording fee payments and processing payments for deposit in the U.S. Treasury so that the FOIA/PA Branch may use this cost to determine whether to charge fees.

**Recommendation P**

The automated FOIA tracking system should include data fields for the components of fee calculations discussed above and the capability to calculate the appropriate fees, generate invoices, and provide ad hoc reports related to fees.

## Web Links

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The FOIA/PA Branch maintains a web page on the Commission's Internet site ([www.sec.gov](http://www.sec.gov)). The FOIA page provides information on how to submit a FOIA request, conventional and electronic reading rooms, annual reports, and frequently requested documents. The FOIA page, however, does not currently provide links to the Commission's FOIA regulations, policy statements, and staff manuals on the Internet. According to OIP guidance, the FOIA page should include these links.<sup>vii</sup>

**Recommendation Q**

The FOIA/PA Branch, in coordination with OIT, should add links from the Commission's FOIA page to the Commission's FOIA regulations, policy statements, and staff manuals.

## Maintenance of Files

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The FOIA/PA Branch's request files contain the administrative record of actions taken in response to FOIA requests. These files contain copies of the request letters, copies of printouts resulting from searches made on automated systems, copies of referrals to other headquarters and field offices, copies of responsive records, and requester correspondence.

The FOIA/PA Branch maintains these documents in file folders. While the written office procedures specify the documents to be kept in the files, the documentation in the files did not appear uniformly organized. Also, the documents were not attached to the file to reduce the risk of their inadvertent misplacement.

**Recommendation R**

The FOIA/PA Branch should ensure that the staff follows the office procedures in organizing the documents in the files.



## **Recommendation S**

The FOIA/PA Branch should develop a system to attach the documents to the file folders in their appropriate sections.

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<sup>i</sup> 5 U.S.C. 552 (1994 & Supp. IV 1998). The FOIA provides the public with the right to access certain records held by executive branch federal government agencies. It requires that agencies publish certain information on agency organization, operations, and rules in the Federal Register, provide continuous availability of information such as agency final opinions and orders, certain administrative staff manuals, and “frequently requested records”, and make records available upon written request subject to applicable exemptions or exclusions. Under certain circumstances, a court could declare agency rules, policies, etc., to be without effect on the public if not properly published. The Commission’s regulations implementing the FOIA are found at 17 CFR 200.80. The Department of Justice, Office of Information and Privacy, provides government-wide guidance on FOIA.

In 1996, the Congress amended the FOIA to address subjects including electronic records, processing time limits, agency backlogs of requests, and annual reporting. These changes included extending the time limit for providing grant or denial determinations to requesters from ten to twenty business days.

<sup>ii</sup> This total in the annual report of 3,006 included 2,985 FOIA requests, 6 Government In The Sunshine Act (GITSA) requests, and 15 PA requests. The FOIA/PA Branch included these totals in its 1999 annual report.

<sup>iii</sup> FOIA liaisons are designated staff in the Commission’s various offices, divisions, and field offices that assist the FOIA/PA Branch by searching, reviewing, and recommending release or withholding of records located in their organizations. FOIA liaisons are appointed from within their organizations-the FOIA/PA Branch does not appoint FOIA liaisons.

<sup>iv</sup> In FY 1999, of the 2,990 FOIA requests processed by the Commission, no records were found in response to 1, 088 requests (36%).

<sup>v</sup> *Oglesby v. Department of the Army*, 920 F.2d 57, 67 (D.C. Cir. 1990).

<sup>vi</sup> Office of Management and Budget fee schedules and guidelines, 52 FR 10012, 10018-19, (March 27, 1987). These guidelines appear silent on whether agencies are required to notify requesters if review fees are estimated to exceed \$25.

<sup>vii</sup> FOIA Update, Vol. XIX, No. 3 (Summer 1998), U.S. Dept. Of Justice, Office of Information and Privacy.